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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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RICHARD H. WHITE,

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On Writ of Certiorari to
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For The First Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of the Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corpora-

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*/ Letters of consent to the filing of this Brief Amicus Curiae are on file with the Clerk of the Court.

tion incorporated under the laws of the State of New York in 1940. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties and has participated as amicus curiae in the federal courts in cases involving many facets of the law.

Attorneys employed by the Legal Defense Fund have participated in many of the leading cases involving attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S 678 (1978); and as amicus curiae, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S 412 (1978). Therefore, the Fund has a direct interest in the resolution of the issues raised in the present case.

SUMMARY OF ARGUMENT

I.

The holding of the First Circuit that counsel fee motions are motions to alter or amend a judgment and therefore must be

filed within 10 days of the entry of judgment, does not give proper consideration to the ethical problems facing counsel in negotiating the merits of their clients' case and their own fees simultaneously. In light of these problems, the result of a 10-day rule will be the otherwise unnecessary litigation of fee requests.

II.

It has been amicus' experience that fee requests are more likely to be resolved by settlement if they have been carefully prepared and fully documented. the time strictures imposed by Rule 59(e) will make such preparation virtually impossible. As a result, the trial courts are likely to be required to hold more hearings, with resulting greater costs to both the courts and the litigants.

ARGUMENT

As noted in the statement of interest above, the Legal Defense Fund has been involved in many of the leading cases here and in the lower courts that have set the standards for recovery of counsel fees in civil rights cases. Our interest in the issue is two-fold. First, the Fund is dependent upon the assistance of attorneys in private practice in carrying out its work. These attorneys are mostly in small firms or in solo practice, and therefore they cannot do civil rights cases on a non-paying basis since they do not have the income-generating base of a large firm. Second, over the last ten years an increasing proportion of the Fund's budget has come from the recovery of court costs and

fees; such recoveries constituted nearly 20% of its income in the years 1979-1980. The funds thus derived support the Fund's entire litigation program, including those cases in which fees were not recoverable.

The Fund, therefore, has had considerable experience in the practical, day-to-day litigation aspects of counsel fee recovery. We believe the Court will find our views as to the impact of the First Circuit's 10-day rule of value in deciding the issues presented by this case. We urge that Congress' clear intent was to facilitate and encourage fee recoveries to provide an incentive to the bringing of civil rights cases. Any rules that impede the carrying out of this intent must be viewed critically, so that any procedural rules governing fee applications will

be consonant with the overriding purpose of the fee statutes.

This brief, therefore, will address two critical problems that would result from the adoption of the position that a counsel fee application is, in effect, a motion to alter or amend a judgment, rather than a collateral matter relating to costs. These are, first, difficulties in settling counsel fee issues, and, second, difficulties in preparing adequate fee applications in a ten-day period. It is amicus' conviction that the First Circuit's rule will inevitably lead to burdening the courts with unnecessary litigation over fee applications.

I.

The Negotiation of Counsel Fees as Part of A Settlement of the Merits of a Case Is Improper

A major deficiency of the decision of the First Circuit is its failure to appreciate the ethical problems presented plaintiffs' attorneys in negotiating counsel fees at the same time as the merits of their clients' claims. While these problems exist even in cases involving individual plaintiffs, they are particularly acute in class actions, where a large number of unnamed class members are dependent on counsel not directly retained by them for the protection of their interests. Simply stated, the simultaneous negotiation of the merits and fees can place counsel in an inevitable conflict of interest with the clients, as has been recognized by the

Third[1] and Ninth[2] Circuits as well as by a number of district courts.[3]

Based on the experience of amicus in litigating hundreds of civil rights cases of all types, there is nothing abstract or hypothetical about this problem. It has arisen in many of the cases it has handled in a variety of contexts. Thus, it has not been uncommon for attorneys for a defendant in a fair employment case to offer a lump sum in settlement.[4] The amount would be represented to be the maximum the client would pay, and it was to be between

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1/ Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977).

2/ Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980).

3/ See, e.g., Regaldo v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978); Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442, 448 (N.D. Ill. 1981).

4/ See, Mendoza v. United States, 623 F.2d at 1352-53, n.19.

plaintiffs and their lawyers to divide it up between themselves as they chose.

A variation on this approach is for defense counsel to request an "approximation" of the fees that would be sought, usually by giving an estimate of the number of hours that would be claimed. Settlement on the merits is conditioned on the approximated fee being "reasonable" in the view of the defendant. Finally, and most difficult for plaintiffs' counsel, are demands that all claims to counsel fees be abandoned as a condition for any settlement of the merits.

The ethical dilemma counsel is placed in in any of these situations is obvious. He or she is forced into weighing the interest of the client, whether in the size of the recovery or any recovery at all, in

obtaining certain relief by a settlement, and his or her own interest in obtaining adequate compensation for services rendered by uncertain litigation. It is impossible for an attorney to negotiate equally on behalf of such conflicting interests, particularly where one interest is his or her own.

It is no solution whatsoever to suggest, as did the court below, that plaintiff may "waive fees altogether". The fee statutes were enacted because Congress realized that without adequate compensation for attorneys, the substantive rights created by the various civil rights acts would not be enforced.[5/] The impact on

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5/ Sen. Rep. No. 94-1011, Civil Rights Attorneys' Fees Act of 1976 (94th Cong., 2d Sess.), p. 2. See also, Newman v. Piggie Park Enterprises, 390 U.S 400 (1968).

enforcement will be the same whether counsel is in private practice or connected with a public interest law organization that depends on fee recoveries for income to carry out its program.

Amicus itself has, in light of these problems, adopted the absolute position that it will not discuss fees in the course of settlement negotiations beyond agreeing to the inclusion of a provision that there is entitlement to them.[6/] If defendants will not agree to such language, then no more discussion is possible, and only the merits of the case will be negotiated. Under the First Circuit's rule, therefore,

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6/ The inclusion of such a provision, which does not specify any amount but which leaves it to later negotiation, is the best way to ensure that no conflict of interest between counsel and client will arise.

whenever plaintiffs' counsel attempts to avoid a conflict with the interests of the client, there will be only ten days in which to negotiate and prepare and file a fee application.

II.

The Ten-day Rule Will Make It Virtually Impossible To Avoid Otherwise Unnecessary Fee Litigation

It is clearly in the interest of all involved to negotiate fee awards wherever possible. Courts are thereby saved scarce time and resources (see, Copeland v. Marshall, 641 F.2d 880, 896, 905 (D.C. Cir. 1980); cf., New York Gaslight Club v. Carey, 447 U.S 54, 65, n.6 (1980)). Plaintiffs' counsel receive fees promptly, and defendants avoid increased fees resulting from the time spent litigating the fee issue itself. (See, e.g., Miller v.

Amusement Enterprises, 426 F.2d 534, 539 (5th Cir. 1970)). The First Circuit's ten-day rule is subversive of all these interests.

Under Rule 59(e), not only must the motion be filed within 10 days, but so must supporting affidavits and documentation. And, the time period is one of the few that may not be extended by the district court. Rule 6 (b), F.R. Civ. Proc.; see, Wolfsohn v. Hankin, 376 U.S. 204 (1964). Faced with the inexorable 10 day period, there will be virtually no time to negotiate fees effectively, since, in amicus' experience, negotiations are far more productive once a detailed statement of hours and rates has been submitted to opposing counsel.

The development of an adequate fee application, moreover, is more complex and

time-consuming than the court below seems to realize. Affidavits of all counsel must be prepared, along with detailed time-sheets, as well as affidavits of attorneys knowledgeable as to prevailing rates for comparable attorneys. It has been amicus' experience that meticulously prepared and thoroughly documented fee applications significantly reduce the time spent in litigating even contested applications, since they eliminate the need for extensive discovery and hearings before the Court to explore the factual underpinning for claimed fees. See, Copeland v. Marshall, 641 F.2d at 905 and n.57. Given time to prepare an application properly, a claim for fees is typically disposed of on the papers. If applications must be hurriedly prepared under unreasonable time constraints, the only result will be otherwise

unnecessary hearings and expenditure of precious court time.

In sum, it is amicus' view, based on years of handling numerous fee applications in civil rights cases, that the rule announced by the First Circuit will only result in the unjustified burdening of litigants and courts. The rule adopted by the Fifth Circuit,[7/] and followed by virtually every other court, is not only in accord with Sprague v. Ticonic National Bank, 307 U.S 161 (1939), but permits flexibility and greatly enhances the likelihood that fee disputes will be resolved thorough settlement by the parties, rather than by prolonged court proceedings.

7/ Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

Conclusion

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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